No. 11794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of Thomas C. Mills, Deceased,

Appellee.

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE.

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I.

Introduction.

Cross-Appellant contends that the District Court should have awarded liquidated damages and a greater amount in attorney's fees. It appears, however, that the principal questions involved have been raised by the appeal; that is, whether the production of ships for war purposes was the production of goods for commerce, and whether Section 2 of the Portal Act removed jurisdiction from the District Court to make any award in this case under the Fair Labor Standards Act. Appellee has also raised the question as to whether the provisions of the Portal-to-Portal Act are constitutional. Appellant's Opening

Brief sufficiently covers the Appellant's position that the production of ships was for military and Naval use and not for commerce. The Court's attention will, therefore, be directed to the application of Section 2 of the Portal-to-Portal Act and the argument in support of the constitutionality thereof.

II.

The Application of Section 2 of the Portal-to-Portal Act.

Appellee concedes that there was no express provision of contract which made the employee's activities compensable during the period of the shift for which the claim was made, but argues that Section 2 is (1) limited to nonproductive employment, such as walking time; and (2) that it will be implied that productive time is compensable at all times. Appellee then places reliance upon a Union agreement, a portion of which is attached as an appendix to the Appellee's brief. This agreement contains no express provision making the claimed activities compensable. On the contrary, it provides that a working shift shall be for a certain period "less thirty minutes for meals on the employee's time." The employee ate lunch during his regular shift and in addition thereto had coffee from time to time. It thus clearly appears that the provisions of the collective bargaining contract expressly disallow the time claimed and nullify any implication that such time was considered as compensable time.

We repeat that Section 2 makes no distinction between productive and nonproductive work or different types of activities. (See pages 11 and 14 of Appellant's Opening Brief—quoting from the Congressional Record.) Under Section 2 in order to determine whether liability exists,

we look only to see whether there was an express provision of contract to pay for an activity no matter what kind of activity it may have been. Appellee relies upon District Judge Duncan's opinion in *Conwell v. Central Missouri Telephone Co.,* 74 Fed. Supp. 542, which is clearly based upon the erroneous premise that the Portal-to-Portal Act was not intended to cover any productive activities but only for traveling and waiting time. There is nothing in the language of Section 2 to support any such premise. As pointed out in our Opening Brief, it was made clear in the Congressional debates that Section 2 of the Act eliminated a great many more claims than those of the type considered in the so-called Portal-to-Portal cases; as stated particularly by Senator Lucas:

> "In other words, any and all claims, over, above and beyond anything that has happened in these Portal-to-Portal suits, are also wiped out or outlawed, so to speak." (93 Cong. Rec. p. 2194.)

The case of *Frank v. Wilson & Co., Inc.,* cited by Appellee on page 14 of Appellee's brief involves an entirely different situation, since in that case the time in dispute had been determined by an arbitration award to be compensable under the Union contract.

Appellee also relies upon the case of *Devine v. Joshua Hendy Corporation,* cited in Appellee's brief at page 15. Appellee fails, however, to point out that in his oral statement at the conclusion of the trial Judge Leon R. Yankwich expressed the opinion that none of the plaintiffs was entitled to any award for activities during the lunch period, inasmuch as the Union contract expressly provided that there should be thirty minutes for meals on the employee's own time.

In the case of *Boerkoel v. Hayes Mfg. Corp.* (U. S. D. C., N. W. Dist., Mich., Mar. 26, 1948, not yet officially reported), 14 C. C. H. Labor Cases, par. 64,415, the contention was made that the activities were productive activities and that, therefore, it was not necessary to plead that they were compensable by an express contract provision. The court, however, applied the clear language of Section 2 and required the plaintiff to amend his complaint.

This position is not only supported by the clear and unambiguous language of Section 2, but is also supported by the Congressional history of the Act, as set forth in our Opening Brief. It follows that the District Court lacked jurisdiction since the activities were not expressly made compensable for the time claimed, and since, on the contrary, were expressly made noncompensable by the Union contract.

III.

Section 2 of the Portal-to-Portal Act Is Constitutional.

The rights given by the Fair Labor Standards Act are statutory, and not vested rights, and Congress has the power to take such rights away. *National Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 174 S. W. (2d) 564; certiorari denied May 22, 1944, 322 U. S. 747. Furthermore, Congress has the constitutional power to abrogate private rights to remove burdens on commerce and provide for the national defense. *Louisville and Nashville Railroad Co. v. Motley* (1911), 219 U. S. 467; *Norman v. Baltimore Ohio R. R. Co.* (1935), 294 U. S. 239; *Fleming v. Rhodes* (1947), 331 U. S. 100.

To our knowledge, all the Federal District Courts which have considered the constitutionality of the Act have upheld its validity. See *Werner v. Milwaukee Solvay Coke Co.* (Wis. Sup. Ct., Mar. 29, 1948), 14 C. C. H. Labor Cases, par. 64,433. The Sixth Circuit Court of Appeals has also upheld its constitutionality; *Rogers Cartage Co. v. Reynolds* (Feb. 16, 1948), 14 C. C. H. Labor Cases, par. 64,317. In this case, the court stated:

> "Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co. v. Securities & Exchange Comm.*, 327 U. S. 686, 708; *American Power & Light Co. v. Securities & Exchange Comm.*, 329 U. S. 90. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United States Constitution. Since they are purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. *Cf. Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.*, 258 U. S. 13; *Kline v. Burke*, 260 U. S. 226, 234. The constitutionality of the Act has been recently considered in the various District Courts, and invariably upheld."

We respectfully submit that Section 2 of the Portal-to-Portal Act is clearly constitutional and its retroactive application is a valid exercise of the Congressional power to regulate commerce.

IV.

Cross-Appeal.

A. Cross-Appellant Is Not Entitled to Liquidated Damages.

Since the District Court had no jurisdiction to award any judgment in this action, it clearly follows that it had no right to award any liquidated damages. However, apart from the jurisdictional question, it clearly appears from the evidence that the thirty minutes during the shift for which the employee was not paid was omitted by the employer in good faith, since it was in accordance with the Union contract between the employer and the employees' Collective Bargaining Agent. It further appears that Union representatives were constantly in the yard and raised no question concerning the compensability of such time. Furthermore, wage payments made to the men were supervised by officials of the Maritime Commission who were at all times in the yard. The work being performed was on a cost-plus-a-fixed-fee contract, so that the employer had no motive to pay its employees other than what they were fully entitled to under the law. For the foregoing reasons, it is respectfully submitted that the Cross-Appellant is entitled to no liquidated damages.

B. Attorney's Fees Should Not Have Been Awarded in Any Amount.

As heretofore pointed out, the District Court did not have any jurisdiction to award a judgment for the plaintiff in this case. It therefore follows that the award of attorney's fees was not proper. If we assume that the Court did have such jurisdiction, however, the determina-

tion of attorney's fees is within the sound discretion of the trial judge. The amount awarded should not be increased except in cases of gross abuse of discretion.

V.
Conclusion.

The claim is barred by Section 2 of the Portal Act. There is no evidence and there are no findings to support the jurisdiction of the District Court under said Act. The Portal Act is clearly constitutional. It is respectfully submitted that the judgment should be reversed.

Dated at Los Angeles, California, April 29, 1948.

Respectfully submitted,

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